The facts relating to the conspiracy and petitioner's participation therein are summarized in the court of appeals' opinion. (Pet. App. A2–A3, A5–A6). Each year the State of Kansas, which is divided into six highway districts, invites closed bids for the supply of asphalt to various locations or "points" where road work is to be done. Representatives of the defendants met annually and allocated among themselves the business of supplying asphalt to the various points and the prices to be charged; suppliers who had not been allocated a particular point bid above the agreed price for delivery there. The conspiracy involved sales of about 112 million gallons of liquid asphalt, of which more than 2½ million gallons were shipped in interstate commerce into Kansas by one of the other defendants from its refinery in Missouri. (Pet. App. A2–A3.)

Petitioner's participation in the conspiracy took place through the Riffe Petroleum Company, which petitioner acquired on December 31, 1960, and operated as a division until petitioner sold it on August 9, 1963 (Pet. App. A2). During this period, petitioner sold liquid asphalt through its Riffe Division to the State of Kansas (*ibid.*). A salesman in petitioner's Riffe Division, Masterson (whom Riffe had employed in early 1960, prior to petitioner's acquisition of the company), with the knowledge of petitioner's vice president in charge of the Riffe Division, attended meetings of the conspirators in 1960, 1961, and 1963 at which the market was divided and prices were fixed (Pet. App. A5–A6; C.A. 10 App. 92, 93).

The court of appeals, in an opinion which discussed in detail all the contentions petitioner now makes (Pet. App. A1–A14), unanimously affirmed the conviction.

## ARGUMENT

Petitioner challenges its conviction on four grounds, each of which involves only the application of settled principles to the particular facts of this case. The court of appeals carefully reviewed and rejected each of these contentions, and there is no occasion for further review of these essentially factual issues.

1. Petitioner argues that the conspiracy of which it was convicted—price fixing on sales to the State of Kansas—is the same conspiracy involved in the earlier case relating to price fixing on sales to the State of Missouri; and that under the Double Jeopardy Clause its Missouri conviction therefore barred its prosecution here. As the court of appeals correctly held, "the resolution of the question [whether one or two conspiracies were involved] depends upon the facts of each case" (Pet. App. A10).[1] See *Blumenthal v. United States*, 332 U.S. 539, 558; *United States v. American Honda Motor Co.*, 273 F. Supp. 810, 815 (N.D. Ill.).

Following a post-trial hearing on the double jeopardy claim (Pet. App. A12), the district court found that the government had established beyond a reasonable doubt that "there was not one large conspiracy

[1] For this reason the court of appeals deemed unpersuasive the *Honda* cases and the *Koontz* case, upon which petitioner here again relies (Pet. 21–27), since "[i]n each of these cases the courts were dealing with facts which do not coalesce with Wilshire's" (Pet. App. A11).

split into small ones" and that the Missouri and Kansas conspiracies "each * * * had its own distinct and illegal purpose," the object of the Kansas conspiracy being to "fix the prices of liquid asphalt sold to the State of Kansas" and the object of the Missouri conspiracy being to fix sale prices "to the State of Missouri" (App. *infra*, p. 14). The court further found (*id.*, pp. 14–15) that

> the conspiracies charged in the indictment in the Eastern District of Missouri and in this district, were completely different and unconnected although necessarily, as the evidence progressed, there was some reference back and forth to the dealings between the defendant here and the other defendants in the case, and the State of Missouri.

The court also found (*id.*, p. 15) that

> proof of the matters charged in the Kansas indictment would not have been admissible had there been a trial on the Missouri indictment and that if admitted, it would not have sustained a conviction on the Missouri indictment * * *.

The court of appeals, after reviewing at length the evidence on the double jeopardy claim (Pet. App. A9–A13), concluded that "the parties here were tried for a plot involving a distinctively separate conspiratorial purpose" (Pet. App. A13). Petitioner has shown no reason for another review of this factual determination.

2. Petitioner contends that the indictment failed to allege and the evidence failed to prove that it know-

ingly participated in the conspiracy (Pet. 32–33). The indictment in paragraph 13 charged knowledge with sufficient specificity: "The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, concert of action among the defendants and co-conspirators * * *." See *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 117 (C.A. 6), affirmed, 328 U.S. 781.

Petitioner's claim that the government had not proved its participation in the conspiracy rests on the contention that it "did not have ample opportunity to detect and reject the illegal practices" (Pet. 37). The proof showed, however, that both before and after petitioner had acquired Riffe, Masterson, as an employee of Riffe, had participated in the conspiracy (Pet. App. A5–A6). The court of appeals held that the "undisputed evidence" was that "during the three year affiliation of Riffe with Wilshire, the vice-president in charge of the Riffe Division knew of and acquiesced in the continued conspiratorial participation" (Pet. App. 6A–7A). Thus, petitioner was properly chargeable with knowledge of the conspiracy because of the participation therein by its employee, Masterson, who represented its Riffe Division.[2]

[2] Petitioner cites (Pet. 39–40) *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied *sub nom. Kelice* v. *United States*, 373 U.S. 915, for the proposition that it was not responsible for the activities of Masterson and Riffe prior to the acquisition. *Carter* held that a corporation was not liable for the crime of its subsidiary committed prior to the merger of parent with subsidiary. In the present case, however, the government proved that the conspiracy continued after petitioner had acquired Riffe, and that after the acquisition petitioner actively participated in the conspiracy through its employee Masterson.

3. Petitioner contends (Pet. 41–49) that the indictment did not allege and the evidence did not prove a conspiracy in restraint of interstate commerce. The indictment charged that liquid asphalt flowed in interstate commerce from one of the defendant's refineries in Missouri to the job sites in Kansas; that the conspiracy was formed to fix prices on the sale of liquid asphalt to the State of Kansas; and that the conspiracy did fix prices (Pet. App. A). This is a sufficient allegation of restraint of interstate commerce. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

The government showed by "undisputed" evidence that one of the members of the conspiracy, Standard Oil, shipped liquid asphalt into Kansas from its refinery in Missouri and further proved that as a result of the conspiracy Standard Oil obtained points in Kansas to which the product that had moved interstate went (Pet. App. A8). Thus, the evidence established that a conspiracy, of which petitioner was a member, restrained interstate commerce. The fact that petitioner itself did not ship asphalt interstate does not relieve it of liability for participation in the

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The government proved that a substantial amount of interstate commerce was affected: more than two and a half million gallons of liquid asphalt. In any event, since the price-fixing conspiracy was in, rather than merely affecting, commerce—see *Swift* v. *United States*, 196 U.S. 375—the amount of commerce is immaterial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

conspiracy. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683.[1]

4. Finally, petitioner argues (Pet. 49) that because of prejudicial newspaper publicity it was entitled to a new trial (Pet. 49–59). A trial court, of course, has broad discretion in determining whether a defendant has been prejudiced and each case turns on its own facts. *Marshall* v. *United States*, 360 U.S. 310, 312. The facts found by the district court (Pet. App. A17–A20) and affirmed by the court of appeals (Pet. App. A8) show that there was no abuse of discretion in denying petitioner's motion for a new trial.

Three of the jurors read the headline of a newspaper story referring to negotiations by the Kansas Highway Board with counsel in an antitrust suit concerning oil (Pet. App. A17–A18). The headline did not mention petitioner (Pet. App. A18). The trial court questioned each of the three jurors separately; it determined that none of them had read beyond the headline (Pet. App. A17–A18). It further found that they realized that the headline referred in some way

[1] Petitioner's reliance (Pet. 46–49) on *Addyston Pipe & Steel* v. *United States*, 175 U.S. 211, a case decided in 1899 before the full reach of the Sherman Act in commerce was established, is misplaced. In *Addyston* the Court modified the decree to eliminate a prohibition against price fixing by companies in the same State. This Court in *Standard Oil Co.* v. *United States*, 337 U.S. 293, read *Addyston* quite narrowly. It pointed out (p. 315): "Modification of the decree [in *Addyston*] was required only to make clear that it did not reach a combination among the defendants doing business in a single State, which was confined to transactions taking place within that same State." In the present case, although the conspiracy was confined to transactions with a single State, a substantial volume of interstate shipments were involved.

to the conspiracy for which petitioner was on trial (Pet. App. A19). Pursuant to a pretrial agreement, the jurors had learned at the start of the trial that the other defendants had pleaded *nolo contendere* (*ibid.*).

The trial court concluded that since the headline never mentioned petitioner and since the jurors knew that the other defendants had pleaded *nolo contendere*, the three jurors who had read the headline had every reason to think it dealt with the codefendants and not with petitioner (Pet. App. A19). Indeed, petitioner took no part in the negotiations to which the headline referred (Pet. App. A19). The court's judgment was reasonable and, as the court of appeals held (Pet. App. A8–A9), it involved no abuse of discretion.[*]

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[*] The cases petitioner cites are inapposite, for they all involved obviously prejudicial publicity that was clearly and unavoidably focused on the defendant. In *Marshall* v. *United States*, 360 U.S. 310, this Court reversed a conviction for unlawful dispensing of drugs. Three of the jurors had read at least one newspaper article which related Marshall's previous criminal convictions and his prior unauthorized practice of medicine. *Id.* at 312. The Court, stating that "each case must turn on its special facts," observed that the information conveyed to the jurors in the articles was so prejudicial as to require a new trial. *Sheppard* v. *Maxwell*, 384 U.S. 333, involved a sensational murder trial where "inherently prejudicial publicity * * * saturated the community" by newspaper, radio and television and where the trial itself had a "carnival atmosphere." *Id.* at 363, 358. Finally, in *Mares* v. *United States*, 383 F. 2d 805, an earlier decision of the Tenth Circuit itself, the jury was exposed to newspaper headlines which disclosed that the defendant had confessed to the crime for which he was on trial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1970.

# APPENDIX

## United States District Court for the District of Kansas

### UNITED STATES *v.* WILSHIRE OIL COMPANY OF TEXAS

### OPINION OF COURT

Delivered October 25, 1968

THE COURT: Well, the defendant has this morning or at least I first saw this morning, a request for findings of fact and conclusions of law stated as being made pursuant to Rule 23 of the Criminal Rules. I believe that Rule 23 actually is applicable only to cases—to situations where the case is tried to the Court on its merits and I don't believe that there is any requirements that there be findings and conclusions on the motion to dismiss, but I have no hesitancy in making them and will make findings and conclusions, not as extensive as the defendant has requested, because I don't feel it is necessary to recite all of the evidence or summarize all of the evidence. Those matters are already a matter of record. But the request will be filed by the clerk so that the defendant will have made the record that the request had been made.

It seems to me this is a factual issue. The determination as to whether there was single or multiple conspiracies is a question of fact for determination by the Court on the motion to dismiss and, as we all know, it was stipulated at the pre-trial conference and I think during the trial and several times, that the case might proceed, reserving to the defendant the

right after trial and after conviction, if the trial should result in conviction, the right to reassert the motion to dismiss on the ground of double jeopardy.

Now, as to where the burden lies, I believe the correct rule is that the burden on the motion to dismiss is on the defendant, but I'll make my findings here on the basis that the government has established beyond a reasonable doubt these matters which I find as findings of fact. Admittedly, some of the findings are mixed facts and law, necessarily so, because of the necessity of comparing the two cases, the case in the Eastern District of Missouri and the case here, and made a little more difficult for the Court by the fact that the Missouri case resulted in a nolo contendere plea rather than trial, so we don't have the facts that were introduced in any trial in Missouri to compare with the facts introduced in the trial here, the evidence introduced here.

But I find and as I say, I find that the government has established beyond a reasonable doubt that there was not one large conspiracy split into small ones; that each conspiracy, the one charged in Missouri and the one charged in Kansas resulting in a conviction after jury trial in Kansas, that each conspiracy had its own distinct and illegal purpose. The sole subject of the Kansas conspiracy was to allocate points or by allocating points, fix the prices of liquid asphalt sold to the State of Kansas, and the purpose of the Missouri conspiracy was identical except that it had to do with the sale of liquid asphalt to the State of Missouri.

I find that the conspiracies charged in the indictment in the Eastern District of Missouri and in this district, were completely different and unconnected although necessarily, as the evidence progressed, there

was some reference back and forth to the dealings between the defendant here and the other defendants in the case, and the State of Missouri.

I find that the proof of the matters charged in the Kansas indictment would not have been admissible had there been a trial on the Missouri indictment and that if admitted, it would not have sustained a conviction on the Missouri indictment and I conclude that the Missouri indictment and the plea of nolo contendere tendered and accepted in Missouri does not constitute a bar to the Kansas prosecution. So, the motion to dismiss on the ground of double jeopardy will be denied.

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